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December 17, 1999

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

VIA HAND DELIVERY

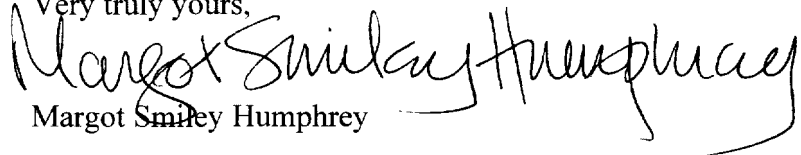
Re: CC Docket No. 96-45

Dear Ms. Salas:

Transmitted herewith, on behalf of TDS Telecommunications Corporation (TDS Telecom), are an original and four copies of comments in the above-referenced rulemaking proceeding. Diskette copies of the comments are also being hand delivered to Sheryl Todd at the FCC's Accounting Policy Division, as well as to the FCC's contractor, ITS, Inc.

In the event of any questions concerning this matter, please communicate with this office.

Very truly yours,

  
Margot Smiley Humphrey

Enclosure

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Federal-State Joint Board on	)	
Universal Service:	)	CC Docket No. 96-45
Promoting Deployment and	)	
Subscribership in Unserved	)	
and Underserved Areas, Including	)	
Tribal and Insular Areas	)	

**COMMENTS OF TDS TELECOMMUNICATIONS CORPORATION**

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## TABLE OF CONTENTS

	Page
I. SUMMARY .....	2
II. LOW SUBSCRIBERSHIP IN AN AREA DOES NOT DEMONSTRATE THAT THE CURRENT PROVIDER'S SERVICE IS UNAVAILABLE, UNREASONABLY PRICED OR INADEQUATE BECAUSE MANY OF THE IMPEDIMENTS TO UNIVERSAL SUBSCRIBERSHIP ARE BEYOND ANY SERVING CARRIER'S CONTROL .....	4
III. THE COMMISSION SHOULD DEAL DIRECTLY WITH SPECIFIC IMPEDIMENTS TO SERVICE IN TRIBAL, UNSERVED AND UNDERSERVED AREAS .....	7
IV. SECTION 214(e)(6) IS A NARROW REMEDIAL AMENDMENT THAT DOES NOT DISTURB STATE DESIGNATION AUTHORITY FOR ANY CLASS OF CARRIERS OR SERVICES OTHER THAN TRIBALLY-OWNED CARRIERS UNREGULATED BY THEIR STATES .....	13
A. Congress Did Not Direct the Commission to Seize State ETC Designation Jurisdiction Whenever It Can Invent a Possible Tribal Nexus .....	15
B. Section 332(c) Does Not Preempt State ETC Designation Jurisdiction for Wireless Carriers or Service .....	18
V. THE COMMISSION SHOULD NOT ADOPT A DIFFERENT DEFINITION FOR UNIVERSAL SERVICE ON TRIBAL LANDS .....	20
VI. THE USE OF COMPETITIVE BIDDING FOR UNSERVED AREAS WOULD REQUIRE RESOLUTION OF MANY QUESTIONS .....	21
VII. CONCLUSION .....	23

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**COMMENTS OF TDS TELECOMMUNICATIONS CORPORATION**

TDS Telecommunications Corporation (TDS Telecom) submits these comments in response to the Further Notice of Proposed Rulemaking (FNPRM)<sup>1</sup> in the above-captioned proceeding looking into ways to increase the availability of services in unserved and underserved areas, including service to tribal lands. TDS Telecom owns 104 incumbent local exchange carriers (ILECS) in 28 states, all of which qualify as "rural telephone companies" under the definition added to the Communications Act in 1996.<sup>2</sup> The TDS Telecom ILECs' service areas include a great deal of high-cost rural territory. TDS Telecom's Arizona Telephone Company subsidiary (Arizona) provides service not only to TDS Telecom's most sparsely populated study area, but also to the Supai Reservation, a remote pocket of the study area with 562 of the Supai tribe's total of 628 members. Residents of the Supai Reservation are located

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<sup>1</sup> In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, FCC 99-204, CC Docket No. 96-45 (rel. Sept. 3, 1999)

<sup>2</sup> 47 U.S.C. §3(37).

primarily at the bottom of the Grand Canyon in Arizona. TDS Telecom hopes that its comments, informed by its experience with high-cost service areas, will assist the Commission in its efforts to ensure high quality, evolving services and capabilities to areas that would likely otherwise be left behind as the economic, educational, health and social well-being of communities throughout the nation become increasingly dependent on telecommunications and information resources.

## **I. SUMMARY**

Despite unusually high costs and challenging conditions, a TDS Telecom ILEC makes service available and has achieved subscription to at least one line in all households in the Supai Reservation at the bottom of the Grand Canyon. Generalizations about the lack of available service often ignore the superior record of small and rural ILECs in difficult markets. Some Supai reservation families do not have, cannot afford or may not even want telephone service, although the local rates are below the national average. Federal universal service support and RUS financing have been essential to achieving the current availability and subscribership. But low income and economic difficulties in tribal lands are remaining impediments to full subscribership that designating different ETCs with different technologies or supporting more than one below-cost provider will not cure. Indeed, a perspicacious tribal alliance has cautioned that some would-be competitive ETC "quick fixes" could harm service for tribal areas that cannot support even one carrier.

More to the point would be immediate Commission actions to improve Lifeline, Link-Up and High Cost support for areas with unusual levels of poverty or economic problems. A different standard for affordability may be necessary and disincentives for investment are particularly strong. Informing residents that Lifeline service is available may also help increase penetration. The Commission should also (a) remove the “interim” cap on high cost loop support, which will deny rural carriers nearly 13% of their total fund requirements in 2000 and (b) repeal its limitation on support for acquired high cost areas – which can include tribal or other areas in dire need of network upgrades. Both caps conflict with the Act’s mandate for “sufficient” federal support. The Commission also needs to resolve issues about the obligations of competing ETCs, which of their lines will qualify for support and which will diminish the incumbent ETC’s support and how to disaggregate study area average support in rural ILECs’ areas to avoid support shortfalls for them and windfalls for competing ETCs. It must also consider how it will protect rural customers’ access to services and choices if the incumbent ETC relinquishes that status and the replacement ETC has fewer universal service obligations. Regulatory uncertainty and the threat of a proxy model for rural ILECs also discourage ILECs and other prudent carriers from investing in high cost areas.

The Commission cannot lawfully stretch § 214(e)(6) to preempt state ETC designation authority in all tribal areas or for wireless carriers. The plain language of the section and the legislative history conclusively demonstrate that Congress neither intended nor enacted federal preemption authority except where a sovereign tribal authority owns the ETC and the state consequently is without jurisdiction over that tribal carrier. The Act calls for state ETC

designation authority in all other cases, and the §332 ban on state rate and entry power over mobile wireless carriers does not defeat state ETC designation authority over "terms and conditions." Nor is even the rate and entry exemption meant to continue if the mobile provider's service is a substitute for telephone service, as an ETC's potential role as an area's only remaining ETC indicates its service must be.

The statute does not allow the Commission to adopt a different definition of universal service for tribal areas. However, the law permits the Commission to designate only one carrier in an unserved area. Thus, it may consider competitive bidding for that limited situation, again because Congress realized that in an area the market has not served, it will not presumptively serve the public interest to encourage competition and diminish the already inadequate opportunity for economies of scale and scope. Thus, a carrier unable to serve an area should be relieved of any duty to serve if another carrier becomes the ETC under section 214(e)(3).

**II. LOW SUBSCRIBERSHIP IN AN AREA DOES NOT DEMONSTRATE THAT THE CURRENT PROVIDER'S SERVICE IS UNAVAILABLE, UNREASONABLY PRICED OR INADEQUATE BECAUSE MANY OF THE IMPEDIMENTS TO UNIVERSAL SUBSCRIBERSHIP ARE BEYOND ANY SERVING CARRIER'S CONTROL**

The Commission seeks information about current service availability, prices and subscribership levels and about the impediments to increased penetration in areas with low subscribership levels. Arizona's Supai exchange offers a good example of the customer benefits and carrier challenges involved in providing service to remote tribal communities. The Supai exchange serves an area of 1,508 square miles. There are 101 access lines, which represents a density of .07 access lines per square mile. However, low density is not the only reason for the

exceptionally high cost of service. Costs are also high because all but two of the Supai exchange customers live in Supai Village at the bottom of Havasu Canyon. The top of the canyon is 325 miles from Phoenix and 70 miles from the nearest town, Peach Spring, Arizona. From the top of the canyon, it is a ten-minute helicopter ride or a nine mile ride by mule or horseback. As a result, the telephone plant investment per line is about \$11,000 (\$5,100 per line in Switch and Microwave plant and \$5,900 per line in Cable and Wire Facilities plant). Expenses are also high. For example, emergency maintenance service for the Supai exchange is dependent on helicopter or horse and mule availability. Each helicopter charter generally requires advance notice of one week and costs \$2,500 -- or more than \$27 per exchange subscriber.

Supai Village customers are served by an Alcatel 300S Concentrator located in the village, which is connected by digital subscriber microwave to a Redcom MDX on the canyon rim. Two more microwave hops carry toll traffic to US West at the Grand Canyon. The tribe owns and operates a PBX donated by Redcom. This PBX does not have a maintenance agreement or battery back up. Thus, when there is a power surge or failure, the PBX drops calls. Arizona has installed battery back up for the microwave system to assure the best possible service from its equipment. Other service problems can result from the need to coordinate with U S West and the US Parks Department in determining causes, as well as coordinating Arizona's facilities with the tribally-owned and maintained PBX equipment.

Only federal universal service support mechanisms and Rural Utilities Service (RUS) financing have made possible the service that is available today to all of the reservation's households, although not all families subscribe. Those programs have also enabled TDS



Telecom to provide basic residential service for an R1 rate of \$9.25 and business service for a basic B1 rate of \$19.20, rates significantly below the nationwide average rates of \$13.87 and \$34.88, respectively. Arizona provides custom calling features, including call waiting/cancel call waiting, call forwarding, special dial service, speed calling, three-way calling, last number redial, call transfer and hotline, as well as dual PIC equal access. The company provides data circuits for the health clinic. It is also awaiting a decision from the tribal council about whether to implement the proposal for providing 15 additional lines for the school at Supai it submitted in response to a tribal request. Internet service is available to Supai exchange customers through a toll call, although there have been few requests for Internet service, perhaps due to the toll charges, lack of perceived need for the service and the economic conditions on the reservation. Federal support for the toll portion of Internet access would likely encourage greater demand for Internet services.

Service is available to all households using current facilities, including the tribe's PBX, and the microwave system can be expanded if more capacity becomes necessary. All households thus have at least one phone line available, although some households have multiple families and some households have or have in the past had more than one line. Subscribership has more than doubled since 1990, with the greatest growth rate around the time when the deployment of the new microwave system made possible more reliable contact to and from the canyon. Nevertheless, current subscribership does not include all Supai families and some residential subscribers no longer have service because of non-payment. Thus, there is good reason to

believe that even Arizona's below-average prices are not affordable for some of the potential subscribers; and others simply may not want a telephone or find it necessary yet.

There are no current Lifeline customers in the Supai exchange area. Arizona service representatives have been directed to offer Lifeline service as an option when a customer signs up for service. The company is also promoting the availability of Lifeline and Link-Up in inserts for the November/December bills.

### **III. THE COMMISSION SHOULD DEAL DIRECTLY WITH SPECIFIC IMPEDIMENTS TO SERVICE IN TRIBAL, UNSERVED AND UNDERSERVED AREAS**

TDS Telecom welcomes the Commission's focus on increasing subscribership in unserved and underserved areas. Residents and businesses of tribal lands will need access to information and telecommunications resources, which will function as the essential backbone for global, national, regional and even local economies, as well as for education, health care and social programs. However, the Commission should not simplistically equate low subscribership with a failure by incumbent ETCs or wireline technology to provide adequate access to communications and information. Where the problem is poverty or a weak local economy, new carriers and new technology will not remove the underlying impediments to universal subscription and evolving network capabilities. Consequently, the Commission should be sceptical in the face of claims that all tribal lands are inadequately served or that some different carrier or technology will provide a panacea for low subscribership.

Economic and cultural impediments that are beyond the control of service providers will require effective federal support, complemented by programs to inform customers about available and useful offerings. For market failure that is concentrated in tribal lands, the Commission should improve its Lifeline, Link-Up and High Cost Support mechanisms to target areas where low income levels may create a different standard for what is affordable. The residential rates for the Supai Reservation are already well below the national average. Thus, expanding existing Lifeline support could further help low income residents to subscribe. Increased Lifeline support should again be accompanied by efforts such as Arizona's current program to ensure that potential customers in areas with low subscribership know that they are eligible for rate relief. For remote and isolated households, increased support for new connections could also help to overcome the obstacles of high cost combined with low incomes.

The Commission should also recognize, as NTCA has shown in its recent white paper, that rural telephone companies often provide better service to their rural service areas, including reservations and other tribal lands, than larger companies provide to the rural portions of their urban-centered areas.<sup>3</sup> Generalizations about the availability and quality of service in tribal or other high cost or low income rural areas mask these significant differences.

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<sup>3</sup> See National Telephone Cooperative Association, Dial-Tone is Not Enough: Serving Tribal Lands (November, 1999); See also Federal-State Joint Board on Universal Service: Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, Tenth Report and Order, CC Docket Nos. 96-45, 97-160, ¶117 (rel. Nov. 2, 1999) (Inputs Order).

Since even local residential rates of around \$10 are not low enough to spur universal subscription in the Supai exchange, and low subscribership potential is a further disincentive to investment in tribal areas, it may also be necessary to consider increasing high cost support to cover a larger share of high costs in areas with low subscription levels.<sup>4</sup> But the Commission should first recognize that its "interim" cap on the Universal Service Fund is an impediment to increasing subscribership in tribal and unserved or underserved areas. The cap is not consistent with ensuring "sufficient" support, as §254 requires. Indeed, the cap is currently denying subscribers and potential subscribers in high cost areas served by TDS Telecom ILECs the benefit of more than \$4 million which the current rural carrier mechanism identifies as necessary. NECA expects the payment shortfalls for the total necessary nationwide transitional support for rural carriers to amount to almost 13% of the total fund requirements for the year 2000. In fact, to the extent that rural ILECs invest in their high cost service areas, including tribal and insular areas, these and all other high cost areas lose a further proportional share of their necessary support because of the cap. The Commission should remove the interim cap.

The Commission's policy of limiting the support available to carriers that acquire underserved rural areas, including tribal lands, from larger ILECs also discourages the very investments and upgrades the Commission seeks to promote here. Some of the rural areas that the non-rural carriers have been selling to rural ILECs include tribal areas, which often require

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<sup>4</sup> NTIA's Falling Through the Net II report indicates that low subscribership in tribal areas is not solely related to low income. It observes that "Native Americans, Asian Americans, and Eskimos, are least likely to have telephone service in rural areas (82.8%), particularly at low incomes (64.3%)" and further explains that "American Indian reservations continue to lag behind the national and rural telephone penetration rates ...."

significant investment to improve substandard service. The customers in acquired tribal or other areas may thus be deprived of upgrades by acquiring rural ILECs or acquisitions may be foregone because the acquisition support freeze restricts the needed support. The Commission should eliminate this second unwarranted and damaging cap and provide acquired high cost service areas with the full measure of “sufficient” support Congress intended to “preserve and advance” universal service for all rural and high cost area customers.

The Commission’s policy of encouraging competitive entry and qualification as ETCs in rural carriers’ study areas increases the uncertainty about whether a rural ILEC will be able to recover further investments for serving and upgrading networks in high cost areas. Uncertainty impairs incentives for modernization. The economic problems and levels of low income tribal areas add significantly to such uncertainty and disincentives. Seeking “quick fixes” by encouraging new technology or carriers can delay or prevent service improvements, as the National Tribal Telecommunications Alliance (NTTA) has pointed out. “Because any given tribal economy will not support more than one telecommunications carrier,” NTTA explained, the Commission must “be wary of limited ‘quick fix’ solutions developed by carriers as much or more for obtaining universal service funding as for meeting the full telecommunications needs of tribes.”<sup>5</sup>

Another impediment to investment associated with the Commission’s policy of encouraging competition among multiple ETCs is the Commission’s failure to resolve the many open questions about the rights and obligations of new and traditional ETCs. For example, the

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<sup>5</sup> Id. at 7.

Commission frequently describes its portability rules as transferring support from the incumbent ETC to the CETC when the new ETC “captures” or “wins” a customer. Yet the Commission has not determined how carriers and USAC will distinguish among lines served by a newly designated ETC that are “captured,” “new,” or have been served without support before the carrier’s designation. Incumbent ETCs and new ETCs’ thus cannot tell whether a new ETC’s existing unsupported lines will be eligible for support, how much support the new ETC will receive, when the incumbent ETC will lose per line support and how much it will lose.

Other open issues that the Commission should decide not only make it difficult for wireless carriers to make an informed decision whether to seek ETC designation in a particular market, but also make it impossible to evaluate the public interest in adding an additional ETC in a rural telephone company study area. For example, the Commission has not yet specified what, if any, terms a wireless carrier must offer to universal service customers in an area where it is designated as an ETC. The Commission’s rulemaking about whether or how much free time a wireless carrier must make available is pending,<sup>6</sup> so there has been no guidance about what rates or how much free air time a wireless carrier must offer to ensure that its service is “affordable.” The Commission has not addressed whether customers on reservations or in other high cost locations will be adequately served if a new ETC that is exempt under section 332(c)(8) from providing equal access to interexchange carriers becomes their only provider, as when an earlier ETC relinquishes its ETC status under section 214(e)(4). And the Commission has yet to adopt a

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<sup>6</sup> Federal-State Joint Board on Universal Service, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-45, paras. 46-54 (rel. October 26, 1998).

rule for “disaggregating” a rural telephone company’s portable support. Disaggregation is necessary to prevent support windfalls and shortfalls during the rural transition when a new ETC gets support based on the incumbent’s average study area-wide support, while the new ETC has substantial choices about how to serve, allowing it to receive averaged support but incur only below-average costs.

Uncertainty and instability are impediments that discourage rural ILECs and other prudent carriers from investing in high cost areas. Since all the major regulatory policies that will control an ILEC’s ability to recover investments are up in the air, its incentives to invest are also likely to be weakened. In this regard, a threatened impediment is the Commission’s apparent intention to impose a forward-looking proxy model on rural carriers for universal service purposes unless the Rural Task Force and Joint Board can persuade it that something else is more suitable.<sup>7</sup> For now, of course, that potential obstacle to rural infrastructure investment has not been designed, let alone validated, but the prospect chills investment. TDS Telecom urges the Commission, the Joint Board and the Rural Task Force to take the different and divergent needs of unserved, underserved, insular and tribal areas into account as they undertake that task. Moreover, the Commission should not take action or rely on assumptions in connection with this FNPRM that are inconsistent with its repeated promise not to impose a forward-looking methodology on rural carriers until 2001 at the earliest and its recognition

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<sup>7</sup> FNPRM, ¶62 (“The Commission intends that rural carriers also will receive support based on forward-looking costs, but only after further review by the Commission, the Joint Board, and the Rural Task Force ... and in no event before January 1, 2001.”)

elsewhere that the methodology has not been shown to be valid for predicting rural carriers' universal service needs.<sup>8</sup>

Finally, the Commission should support continuation of the RUS and RTB programs that have been indispensable in extending universal service to rural areas. Not only do these programs fill a need that the marketplace has not met in the past, but the financing also carries the obligation of area-wide service, one reason for the more comprehensive rural service typically provided by rural telephone companies.<sup>9</sup>

**IV. SECTION 214(e)(6) IS A NARROW REMEDIAL AMENDMENT THAT DOES NOT DISTURB STATE DESIGNATION AUTHORITY FOR ANY CLASS OF CARRIERS OR SERVICES OTHER THAN TRIBALLY OWNED CARRIERS UNREGULATED BY THEIR STATES**

Specifically resolving the practical problems and service impediments identified above would be much more likely to lead to service improvements in tribal lands and other high cost areas than will the Commission's proposals to supplant state ETC designation authority for an open ended set of situations involving tribal lands or wireless terrestrial and satellite carriers. And the Commission's bid to assert more designation authority is not supported by law or public policy.

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<sup>8</sup> The Commission has held that the proxy cost model has not yet been shown to be sufficiently accurate for use in a rural carrier's study area. Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776, ¶ 309 (1997).

<sup>9</sup> 7 U.S.C. §§921, 922 (enacting and enforcing national financing programs' purpose to "assure the availability of adequate telephone service to the widest practicable number of rural users of such service").



Section 214(e)(2) authorizes the states to designate ETCs within their boundaries. The provision specifically instructs the states how to deal with requests for a second or further ETC designation, depending on the nature of the already-designated ETC. The statute states:

Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1).

The law deliberately set an extra legal hurdle for requests involving an additional designation in an area served by a “rural telephone company,” which includes all the TDS Telecom ILECs, and gives the states discretion not to designate additional carriers by the phrase “may ... designate more than one” for rural ILEC areas. “Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company,” the statute then requires,” the State commission shall find that the designation is in the public interest.” This general rule that states will delegate ETCs makes sense, since they have the closest knowledge of the needs and characteristics of service areas within their boundaries. Local familiarity is especially important in areas served by rural telephone companies, where the state must make a public interest evaluation as the precondition to an additional designation. Indeed, the Fifth Circuit overturned the Commission’s attempt to read the statute as precluding the states from imposing other reasonable criteria for granting designation requests, such as quality of service requirements.<sup>10</sup>

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<sup>10</sup> Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 418 (5th Cir., 1999), petitions for rehearing and rehearing en banc denied (Sept. 28, 1999), petition for extension of

**A. Congress Did Not Direct the Commission to Seize State ETC Designation Jurisdiction Whenever It Can Invent a Possible Tribal Nexus**

Section 214(e)(6) was enacted after the 1996 Telecommunications Act and the remainder of Section 214 (e) had become effective to remedy a specific gap that had been discovered in the 1996 Act's designation provisions: Local exchange telephone companies owned by Native American tribes and providing service on federally-recognized reservations are not subject to state authority because the tribes possess sovereign powers for their reservations. The provision provides for remedial federal jurisdiction only "[i]n the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission."

Claiming ambiguity, the Commission reads the provision (§81) as applying to services (such as wireless services, it suggests) or geographic areas (such as tribal lands) that are not subject to state jurisdiction. The Commission nevertheless concedes that the statutory heading is "Common Carriers not Subject to State Commission Jurisdiction," and the FNPRM itself refers to "carriers" beyond state jurisdiction in the preceding paragraph.

The plain language and basic English grammar preclude the Commission's strained reading. The Commission's view that the law applies to services and areas not under state jurisdiction necessarily rests on the ungrammatical reading: "telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission," rather than recognizing the grammatically sound and obviously correct application "[i]n the case of a

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time to seek certiorari pending.

common carrier ... that is not subject to the jurisdiction of a State commission.”<sup>11</sup> The stretch to reach tribal lands or wireless services and argue that they are not subject to state jurisdiction simply does not work as a matter of statutory interpretation.

The legislative history supports the plain language meaning -- that Congress intended only non-subject carriers, such as tribal-owned telephone companies in cases where the state does not assert jurisdiction, to fall under the federal jurisdiction conferred upon this Commission. Senator McCain, co-sponsor of the legislation in the Senate, for example, engaged in a colloquy on the Senate floor with Senator Daschle, another co-sponsor, on November 12, 1997. Their exchange notes that states typically lack jurisdiction over “tribally owned companies,” but expressly explains that “this bill does nothing to alter the existing jurisdiction that state commissions already have over local exchange carriers or providers of commercial mobile radio services as set forth in Section 332(c)(3) of the Telecommunications Act.”<sup>12</sup> Representative Hayworth’s statement on the House floor on November 13, 1997<sup>13</sup> also confirms that the intent and effect of the legislation adding section 214(e)(6) was to “correct[ ] a technical glitch in section 214(e)” because the original law could be read to deny support to a “tribal-owned carrier” even if it “is a traditional incumbent local exchange carrier that provides the core universal services, ... [has] previously received Federal universal support or ... will be deemed a carrier of

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<sup>11</sup> In this correct reading, the plural phrase “providing local exchange service and exchange access” simply modifies the singular object, “a common carrier,” of the prepositional phrase “[i]n the case of.”

<sup>12</sup> November 13, 1997 Cong. Rec. S12568.

<sup>13</sup> November 13, 1997 Cong. Rec. H10808.

last resort to serve every customer in their service area.” He supported passage so “four tribal authority telephone cooperatives that are not subject to State jurisdiction” in his “home State of Arizona” could “continue to serve their customers as eligible carriers.”<sup>14</sup> Colloquy between Representatives Thune and Bliley<sup>15</sup> reaffirmed that “nothing in this bill is intended to expand or restrict the existing jurisdiction of State commissions over any common carrier or provider in any particular situation ....”<sup>16</sup>

Accordingly, the Commission should follow its own suggested procedure (§ 85) and not question state ETC designation authority unless the state declines to exercise designation jurisdiction or a tribe claims it is not subject to jurisdiction asserted by a state. This practice would respect Congress’s general intention for state authority to apply unless the carrier was not subject to state jurisdiction, which would limit the application to tribally-owned carriers with sovereignty and, perhaps, municipal carriers, if any, that are exempt from their state’s regulatory process. Since the amendment is not intended to “restrict” existing state jurisdiction, the Commission should not sweep service provided by a non-tribal company under §214(e)(6) where states have historically regulated such telephone companies’ operations, even if they involve reservations or other officially or arguably sovereign tribal areas within a state, particularly when the tribe has not challenged state regulatory authority. Where the state has exercised or asserted

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<sup>14</sup> Representative Markey also referred on the same day in the House debate to “finetuning” the 1996 Act for carriers that are “not subject to the jurisdiction of a State commission, including those telephone companies owned by certain federally-recognized Indian tribes ....”

<sup>15</sup> November 13, 1997 Cong. Rec. H10808.

<sup>16</sup> Id., at H10808-09.

jurisdiction in the past, there should be a presumption that the state jurisdiction falls within the “existing state jurisdiction” the amendment was not intended to disturb.

To change horses in midstream and rule that states inherently lack jurisdiction over certain carriers’ services or certain geographic areas would invalidate numerous existing state ETC designations in tribal lands or to wireless providers, allow the present ETCs to cease service without the procedure in §214(e)(4) and could be understood to revoke ILECs’ state-granted operating authority to provide service on tribal lands at all.<sup>17</sup> Indeed, where sovereignty of a tribe prohibits state regulation, one wonders what bestows Commission authority to license CMRS or PCS providers to operate within tribal territory. How voiding current service authorizations and ETC designations would increase subscribership or improve services in these areas from such massive dislocation is not even mentioned in the FNPRM.

**B. Section 332(c) Does Not Preempt State ETC Designation Jurisdiction for Wireless Carriers or Services**

The Commission suggests (§80, n.170) that it, rather than the state, may have jurisdiction to designate terrestrial wireless or satellite carriers as ETCs. The Commission does not explain why intrastate services provided by satellite would escape state jurisdiction. The only apparent basis for asserting federal designation authority over CMRS services is the limited state preemption provision in §332(c)(3), which, as noted above, Senators McCain and Daschle specifically excluded from the amendment’s effects. CMRS providers cannot be described as not

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<sup>17</sup> For example, Arizona Telephone Company has not only been designated as an ETC to serve the Supai Reservation, but also holds its basic local operating authority for the Reservation and the rest of its study area from the State of Arizona, and TDS Telecom’s cellular affiliate US Cellular has been designated as an ETC in service areas in Washington State.

subject to state regulation. In the first place, it is only their “mobile” services that are exempt even from entry and rate regulation under §332(c), since both the section as a whole and subsection (c) “Regulatory Treatment of Mobile Services” are express in the scope of their application. The preemption portion is also narrow. It provides that “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service.” It is significant that the exclusion applies only to mobile services, since (a) the capability to provide mobile service is not within the definition of federally supported universal services<sup>18</sup> and (b) the Commission<sup>19</sup> and at least one CMRS provider<sup>20</sup> have acknowledged that mobile service does not meet the quality standards of the existing voice network.

Moreover, the rate and entry preemption in §332(c)(3) does not preempt state ETC designation authority. The preemption provision reserves state regulation other than over rates and entry with the limiting phrase “except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.” ETC designation does not involve rate or entry regulation. CMRS providers do not need ETC status to provide their

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<sup>18</sup> 47 C.F.R. §54.101. In addition, §254(c) requires that a carrier use support only for the “provision, maintenance and upgrading of services for which the support is intended.”

<sup>19</sup> Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 99-238, CC Docket No. 96-98, ¶188 (rel. Nov. 5, 1999).

<sup>20</sup> See Before the Public Utilities Commission of the State of South Dakota, Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, TC98-146, ¶¶9-10, 19 (rel. May 19, 1999), (SD PUC Order). See also Minnesota Public Utilities Commission Staff Briefing Papers, prepared for meeting on September 29, 1999, p. 3, which discloses that “MCC currently provides only mobile cellular service in Minnesota, which it agrees does not qualify as a universal service offering.”

services throughout their federally-authorized service areas, and state designations of ETCs are not required to deal with rates. Section 332(c) also reserves state authority for even-handed state universal service regulations where the service becomes a substitute for a substantial part of the state's land line local exchange communications and creates a process for the state to seek Commission restoration of its rate and entry authority. The Commission has not explained how a carrier can undertake the responsibilities of an ETC, which include the duty to maintain the only service if the incumbent ETC gives up its ETC status, without providing service that is a substitute for the previously designated wireline carriers' service in the designated ETC service area.

**V. THE COMMISSION SHOULD NOT ADOPT A DIFFERENT DEFINITION FOR UNIVERSAL SERVICE ON TRIBAL LANDS**

The FNPRM asks whether a different definition of universal service may be appropriate for tribal lands. The Commission cannot take this approach as a matter of law and policy.

Section 254(a) through (c) controls the way that universal service is defined for the purposes of the federal support mechanisms. The defined services are the minimum required list of services that the Joint Board and Commission have adopted to date. There is certainly no justification for asking subscribers on tribal lands to settle for less. Indeed, the Commission will soon be revisiting the nationwide definition and should be seriously considering broadening the universal service definition to foster nationwide upgrades consistent with the statutory objective of "reasonably comparable" rural and urban access to "advanced telecommunications and information services." When the Commission changes the definition to provide for network evolution, it should do so for all of the nation's consumers and businesses at once.

Nor would it be lawful or equitable to adopt a different definition for tribal areas, even if tribal representatives preferred it. Section 254(c)(3) enables the Commission to add to the definition of universal services to be supported by the federal mechanisms, but only for stated purposes. It states that:

[i]n addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

There is no legal basis for rewriting the statute to add tribal lands to the specific, narrow list of exceptions Congress enacted.

#### **VI. THE USE OF COMPETITIVE BIDDING FOR UNSERVED AREAS WOULD REQUIRE RESOLUTION OF MANY QUESTIONS**

The Commission seeks comment on whether to use competitive bidding for unserved and underserved areas. TDS Telecom believes that the term “underserved” is not a workable tool for imposing requirements or shaping national policy. As noted earlier, the conclusion that an area is “underserved,” with the implicit suggestion that the current carrier is not providing the necessary level of service is problematic. Low subscribership, for example, could indicate inadequate facilities and unavailability of universal services. But low penetration may also reflect no more than that the carrier’s available, reasonably priced service is not taken by the nationwide average percentage of households because the area has unusual poverty levels or residents do not choose to take service for cultural or other reasons beyond the provider’s control.



The statute does not permit the Commission to use competitive bidding in areas already served by a rural carrier by claiming that the area is “underserved.” The Act specifically dictates both (a) how a state should determine whether to designate another ETC in a rural ILEC’s study area and (b) the way that a carrier qualifies or withdraws as an ETC under state jurisdiction.

But the “unserved areas” provision creates a different legal framework. If the Commission considers competitive bidding for unserved areas, it would have to justify bidding as an appropriate way to determine which “carrier or carriers” is or are best able to provide service and limit itself to bidding for interstate services, as §214(e)(4) establishes separate federal and state authority. Section 214(e)(4) plainly allows the Commission to provide for exclusive service by one carrier in an unserved area, which makes sense when the area has not been able to attract even one carrier in the face of the existing marketplace, technology and support. As with the recognition in §214(e)(2) that multiple ETC designations will not automatically serve the public interest in areas served by rural ILECs, §214(e)(4) reflects Congress’s awareness that competition is not always the means to achieve universal service where complete market failure has occurred. If an area is unserved and no carrier is willing to serve it, it would be irresponsible to designate multiple supported ETCs. Extra designations and support would reduce economies of scale and scope in the hardest to serve areas, increase universal service contributions and drive up the cost customers ultimately pay for universal service. Consequently, if the Commission wisely designates an exclusive carrier to serve an unserved area within the boundaries of another carrier’s state-recognized service territory, the Commission should relieve the carrier that was unable to serve that particular location from any obligation to do so.

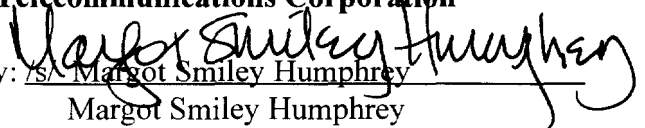
## VII. CONCLUSION

Therefore, the Commission needs to tailor its universal service program for unserved and tribal areas to meet their needs, rather than looking for the kind of “easy fix” from competing different technology or competing carriers a tribal alliance fears will have adverse effects on very thin markets. Since low subscribership may indicate low income and economically distressed areas, and cannot be assumed to mean that current rural ILEC ETCs are providing inadequate service or rates, the Commission should look to Lifeline and Link-Up support for areas that need a different standard for what is affordable. The Commission should also remove the cap on transitional loop support and its restriction on the support available when an exchange, sometimes serving a reservation, is acquired by a carrier willing to upgrade it. It should prevent windfalls and shortfalls by disaggregating transitional study area average support. The Commission should promptly resolve the open issues about competing ETC responsibilities, supported lines, support lost by incumbent ETCs for “captured” lines and the safeguards necessary for customers if the incumbent withdraws s an ETC. The Commission should follow the plain language and history of §214(e)(6) and the terms of §332(c) and discard its unlawful proposals to preempt state designation authority for tribal lands rather than only tribally-owned “sovereign” ILECs and for wireless carriers. It should strictly keep its promise not to change rural carrier support until after Rural Task Force, Joint Board and Commission review. And, if

the Commission can resolve the issues surrounding competitive bidding for truly unserved areas, it can allow an exclusive carrier authorization, but should not, in any event, try to compel multiple carriers to serve an area that the marketplace has not been able to serve even with existing support mechanisms.

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December 17, 1999

### **CERTIFICATE OF SERVICE**

I, Victoria C. Kim, of Koteen & Naftalin, hereby certify that true copies of the foregoing TDS Telecom's Comments on the rulemaking proceeding CC Docket No. 96-45 have been served on the parties listed below, via first class mail, postage prepaid on the 17th day of December 1999.

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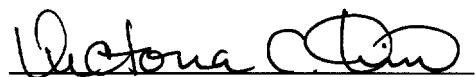
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